



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD188]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Elkhorn Slough Tidal Marsh Restoration Project, Phase III in Monterey County, California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments on proposed renewal incidental harassment authorization.

SUMMARY: NMFS received a request from the California Department of Fish and Wildlife (CDFW) for the renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to restoration activity associated with the Elkhorn Slough Tidal Marsh Restoration Project, Phase III, in Monterey County, California. These activities consist of activities that are covered by the current authorization but will not be completed prior to its expiration. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed renewal not previously provided during the initial 30-day comment period.

DATES: Comments and information must be received no later than *[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, and should be submitted via email to *ITP.clevenstine@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments, including all attachments, must not exceed a 25-megabyte file size.

Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>*. In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Alyssa Clevenstine, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow,

upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, an incidental harassment authorization is issued.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed 1 year for each reauthorization. In the notice of proposed IHA for the initial authorization (86 FR 43204, August 6, 2021), NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Description

of the Specified Activities and Anticipated Impacts section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA).
2. The request for renewal must include the following:
 - An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).
 - A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.
 - Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed renewal. A description of the renewal process may be found on our website at:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals>. Any comments received on the potential renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested renewal, and agency responses will be summarized in the final notice of our decision.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an IHA renewal) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NAO 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has preliminarily determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

History of Request

On September 16, 2021, NMFS issued an IHA to CDFW to take marine mammals incidental to Phase III of the Elkhorn Slough Tidal Marsh Restoration Project in Monterey County, CA, effective from September 16, 2021 through September 15, 2022 (86 FR 52644). On July 12, 2022, CDFW informed NMFS that the project was delayed and none of the work identified in the initial IHA (*i.e.*, restoration work at the Seal Bend Restoration Area) had occurred, and submitted a request for re-issuance of the initial IHA with new effective dates of September 16, 2022, through September 15, 2023 (87 FR 56631, September 15, 2022). On July 6, 2023, NMFS received an application for the renewal of the IHA. As described in the application for renewal IHA, the activities for which incidental take is requested consist of activities that are covered by the initial, and reissued, authorization but will not be completed prior to its expiration. As required, the applicant also provided preliminary monitoring results which confirm that the applicant has implemented the required mitigation and monitoring, and which also show that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

Description of the Specified Activities and Anticipated Impacts

Phase III of CDFW's construction Elkhorn Slough Tidal Marsh Restoration Project consists of relocating soil from an upland area through the use of heavy earth-moving equipment to the Seal Bend Restoration Area, and will restore 28.6 acres (11.57 hectares) within a 12 month period. The planned activities (including mitigation, monitoring, and reporting) and anticipated impacts on the affected stocks are the same as those analyzed and authorized through the initial IHA.

A detailed description of the planned restoration activities is found in the **Federal Register** notice for the proposed initial IHA (86 FR 43204, August 6, 2021). The location, timing, and nature of the activities, including the types of equipment planned for

use, are identical to those described in the initial IHA. The mitigation and monitoring are also as prescribed in the initial IHA.

Construction activities are expected to produce airborne noise and visual disturbance that have the potential to result in behavioral harassment of Pacific harbor seals (*Phoca vitulina richardii*). A description of the methods and inputs used to estimate take anticipated to occur and, ultimately, the take that was authorized is included in the previous documents referenced above. The data inputs and methods of estimating take are identical to those used in the initial IHA. NMFS has reviewed recent stock assessment reports, information on relevant unusual mortality events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial IHA. No work was completed under the initial IHA and only 15 days of work have been completed since reissuance of the initial IHA.

This renewal request is to cover a subset of the activities described for the initial IHA that will not be completed during the effective IHA period. CDFW plans to continue construction activities between September 2023 and September 2024. CDFW estimates it will take 225 days to complete construction necessary to support restoration of the Seal Bend Restoration Area, as only 15 days of work out of the 240 days of planned construction are expected to be completed within the effective dates of the currently active IHA.

The likely or possible impacts of CDFW's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors and is unchanged from the impacts described in the initial IHA. Potential non-acoustic stressors could result from the physical presence of construction equipment and personnel. Acoustic stressors include effects of heavy equipment operation during soil excavation, transport, and placement. The effects of airborne noise and visual disturbance from CDFW's proposed activities have the potential to result in Level B harassment of marine mammals in the action area.

Detailed Description of the Activity

A detailed description of the construction activities for which take is proposed here may be found in the notices of the proposed and final IHAs for the initial authorization (86 FR 43204, August 6, 2021; 86 FR 52644, September 22, 2021). As previously mentioned, this request is for a subset of the activities anticipated in the initial, and reissued, IHA that would not be completed prior to its expiration. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notice for the initial IHA. CDFW is requesting a renewal IHA for relocating soil from an upland area through the use of heavy earth-moving equipment. The proposed renewal would be effective for a period not exceeding 1 year from the date of expiration of the reissued IHA. The proposed renewal IHA would be effective from September 16, 2023 through September 15, 2024.

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the notice of the proposed IHA for the initial authorization (86 FR 43204, August 6, 2021). NMFS has reviewed the preliminary monitoring data from the reissued IHA, recent draft stock assessment reports, information on relevant unusual mortality events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the description of the marine mammals in the area of specified activities contained in the supporting documents for the initial IHA (86 FR 43204, August 6, 2021).

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which the authorization of take is proposed here

may be found in the notice of the proposed IHA for the initial authorization (86 FR 43204, August 6, 2021). NMFS has reviewed the preliminary monitoring data from the reissued IHA, recent draft stock assessment reports, information on relevant unusual mortality events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notice of the proposed IHA for the initial authorization (86 FR 43204, August 6, 2021). Specifically, days of operation, area or space within which harassment is likely to occur, and marine mammal occurrence data applicable to this authorization remain unchanged from the initial IHA. Similarly, the stock taken, methods of take, daily take estimates, and types of take remain unchanged from the initial IHA. The number of takes proposed for authorization in this renewal are a subset of the initial authorized takes that represent the amount of activity left to complete. These takes, which reflect the lower number of remaining days of work (225 days), are indicated below in Table 1.

Table 1 -- Proposed Amount of Taking, by Level B Harassment, by Species and Stock and Percent of Take by Stock

Species	Scientific Name	Stock	Proposed Take	Percent of Stock
Harbor seal	<i>Phoca vitulina richardii</i>	California	1,800	5.8

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register**

notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document and the notice of the proposed IHA remains accurate. The following measures are proposed for this renewal:

- Construction work must occur only during daylight hours and should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.*, fog, heavy rain, smoke), construction must be delayed until the Protected Species Observer (PSO) is confident marine mammals within the shutdown zone could be detected;
- CDFW must fulfill visual monitoring requirements, which includes the use of NMFS-approved PSOs and the establishment of a Level B harassment zone within 300 meters (m) of all construction activities;
- A 30 minute pre-construction clearance period must occur prior to the start of ramp-up (*e.g.*, ramp up by moving around the project area and starting equipment sequentially) and construction activities;
- CDFW must shutdown heavy machinery work if a marine mammal comes within 10 m;
- During harbor seal pupping season (March through July), CDFW must not initiate construction activities within 300 m of a mom/pup pair that is hauled out, or within 100 m of a mom/pup pair in the water. If there is a gap in construction activities of more than an hour or if construction moves to a different area, this initiation protocol must again be implemented. During site containment activities that are underway, heavy machinery must not approach closer than 100 m of where mothers and pups are actively hauled out. If a pup less than one week old (neonate) comes within 20 m of where heavy machinery is working, construction activities in that area must be shutdown or delayed until the pup has left

the area. In the event that a pup less than one week old remains within those 20 m, NMFS will be consulted to determine the appropriate course of action;

- Construction activities must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone;
- CDFW must conduct a census of marine mammals in the project area and the area surrounding the project at least 30 minutes prior to the beginning of construction on monitoring days, and again 30 minutes after the completion of construction activities. CDFW must also conduct hourly counts of animals hauled out and in the water within at least the Level B harassment zone, as well as reactions observed in relation to construction activities;
- CDFW must submit a draft report detailing all monitoring within 90 calendar days of the completion of marine mammal monitoring or 60 days prior to the issuance of any subsequent IHA for this project, whichever comes first;
- CDFW must prepare and submit final report within 30 days following resolution of comments on the draft report from NMFS;
- CDFW must submit all PSO datasheets and/or raw sighting data (in a separate file (*e.g.*, Microsoft Excel or similar) from the Final Report referenced immediately above); and,
- CDFW must report injured or dead marine mammals.

Comments and Responses

As noted previously, NMFS published a notice of a proposed IHA (86 FR 43204, August 6, 2021) and solicited public comments on both our proposal to issue the initial IHA for construction activities associated with Phase III of the Elkhorn Slough Tidal Marsh Restoration Project and on the potential for a renewal IHA, should certain requirements be met. During the 30-day public comment period, NMFS received no comments on either the proposal to issue the initial IHA or the potential for a renewal IHA.

Preliminary Determinations

The proposed renewal request consists of a subset of activities analyzed through the initial authorization described above. In analyzing the effects of the activities for the initial IHA, NMFS determined that the CDFW's activities would have a negligible impact on the affected species or stock and that authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.*, less than one-third the abundance of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) CDFW's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this proposed action.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to CDFW for conducting construction activities associated with Phase III of the Elkhorn Slough Tidal Marsh Restoration Project in Monterey County, CA, from September 16, 2023, through September 15, 2024, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>. We request comment on our analyses, the proposed renewal IHA, and any other aspect of this notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: July 27, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

